STATE OF MICHIGAN

IN THE SUPREME COURT

TOMO PERKOVIC,

Plaintiff-Appellee,

v

AARON WILLIAM BROWN,

Defendant-Appellant.

Supreme Court
No. 123171

Court of Appeals
No. 235699

Macomb County Circuit
Court No. 00-004399-NI

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123171
reply

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

FILED

MAR 11 2003

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

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DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

NOW COMES Defendant-Appellant AARON BROWN, through his attorneys, and, in reply to Plaintiff's response to Defendant's application, states the following:

1. Presently pending before this Court in this matter is Defendant Brown's timely-filed (January 30, 2003) Application for Leave to Appeal from the Court of Appeals' decision.

Plaintiff-Appellee Perkovic has filed a Response dated February 19, 2003.

Defendant-Appellant Brown submits this Reply.

2. Plaintiff's Response (see, e.g., p. 8) simply asserts, without any factual support whatsoever, that Defendant was negligent in this motor vehicle accident case because he "ran the red light" (emphasis added) at the intersection where the accident occurred.

This "red light" assertion by Plaintiff's counsel is in conflict with Plaintiff's own deposition testimony on which Defendant based his motion for summary disposition and on which the trial court granted summary disposition, before the Court of Appeals reversed that grant and remanded this case to the trial court. As pointed out in Defendant's Application, Plaintiff admitted that, when he turned left (into the path of Defendant), he last saw a yellow traffic light, and he never saw the light turn red. He admitted that he never even saw Defendant before the collision. He admitted that he had no evidence either that Defendant was speeding or that the light was red. He admitted that he simply assumed or speculated that Defendant was speeding and ran a red light.

After taking the matter under advisement in order to review Plaintiff's entire deposition, the trial court's Opinion and Order (granting Defendant's motion for summary disposition), at p. 4, characterized the allegations of Defendant speeding and running a red light as quoting Plaintiff's testimony "out of context" because Plaintiff's testimony demonstrated that he had "merely assumed" these things. The trial court's opinion, at pp. 4-5 specifically noted that:

> "Plaintiff admitted he is unaware of any witnesses to the accident and that he is unable to proffer any evidence to

> suggest defendant was either speeding or ran other than a yellow light."

With regard to Plaintiff's observation of a yellow light and Plaintiff's speculation that the light turned red, the trial court specifically found:

> "Significantly, the record is devoid of any evidence as to how long the subject traffic light remains yellow before turning red. Consequently, no inference can be made that the light would have turned red before the accident."

(Opinion and Order, p. 4).

3. The reference to a red light in the Court of Appeals' opinion in this matter, and Plaintiff's continued reliance on a red light in his allegations to this Court, are based on pure speculation, not record evidence, and are therefore contrary to the controlling legal standards for disposition and review of a motion for summary disposition. Maiden v Rozwood, 461 Mich 109, 120-121 (1999).

We know that even Plaintiff knows he is relying on speculation rather than evidence because Plaintiff's Response, in referring to a "red light," uses expressions such as: "one can logically conclude" (Response, p. 8); "the conclusion of negligence logically flows" (Response, p. 8); "circumstantial evidence of the color of the light" (Response, p. 12); "reasonable inference" (Response, p. 13); and Plaintiff "believed the light to be red" (Response, p. 16). Plaintiff's Response, at p. 13, admittedly relies on the assumption that every "yellow light turns red eventually" (emphasis added). Although Plaintiff's assumption is not always valid (some yellow lights never turn red), even if we assume

that it is valid here, it does not follow that the light was red when the instant collision took place.

4. In an effort to supply the missing evidence of a red light, Plaintiff's Response argues that the light must have been red because another car (not Defendant's) coming at Plaintiff from the opposite direction had already come to a stop at the intersection:

> "At that point he observed at least one vehicle already stopped for the light on the northbound side. Mr. Perkovic stopped and specifically looked for clear traffic and then turned (Exhibit 4, Dep. Tr. pp. 18-20, 27, 31). The conclusion of negligence logically flows as from the time the vehicle in front of him had turned on a yellow light to the point when Mr. Perkovic ultimately made his turn, there had been enough time during which the light would have turned red. (Exhibit 4, Dep. Tr. p. 31.) This is substantiated by Mr. Perkovic's testimony that he observed a vehicle already stopped for the light on the northbound side. (Exhibit 4, Dep. Tr. p. 31.)"

(Plaintiff's Response, pp. 8-9; emphasis added).

This is a most misleading and disingenuous suggestion – i.e., that the oncoming Defendant did not stop for what must have been a red light but another oncoming vehicle did stop. Fortunately, this very point was carefully explored and negated by cross-examination of Plaintiff at his deposition. Plaintiff's deposition testimony established that the opposite-direction stopped vehicle was stopped, not in the through lane that Defendant was traveling in, but rather in the left-turn lane directly across from Plaintiff's stopped vehicle. The stopped vehicle was Plaintiff's opposite-direction left-turn counterpart which apparently was waiting to turn left like Plaintiff but which did not turn

left when Plaintiff did. (See Appendix A to Defendant's Application: Plaintiff's dep, at pp. 31-35).

5. Plaintiff's Response, at p. 4, argues that the Court of Appeals opinion in this case correctly found that "Plaintiff may have been partially negligent, but that whether Defendant was also partially negligent, was not determinable from the record" (emphasis added). Plaintiff is doubly wrong. First, the Court of Appeals did not just find that Plaintiff may have been negligent; the Court found that "Plaintiff was partially at fault" (CA Opinion, at p. 2). After all, Plaintiff turned left directly into Defendant's path and was immediately struck by Defendant, admittedly without Plaintiff ever having seen Defendant (CA Opinion, at p. 1). Secondly, the Court of Appeals did not just find that it could not be determined on this record whether Defendant was also or equally negligent; the Court of Appeals further explained that the inability to make that determination was due to the lack of record evidence of Defendant's negligence. Since there was no record evidence of Defendant's negligence, and since it could not be determined from this record that Defendant was negligent, that means that the trial court was correct in granting summary disposition to Defendant; in order to avoid summary disposition, Plaintiff had to respond with some record admissible evidence of Defendant's negligence. Maiden, supra.

6. Plaintiff's Response, at pp. 5-6, 12, argues that there was a credibility dispute over the color of the traffic light and Defendant's distance from the intersection, thereby giving rise to a material factual dispute that could not be decided by summary disposition.

There was no dispute over Defendant's distance from the intersection. Plaintiff turned left in front of Defendant, without seeing Defendant, and was immediately struck by Defendant in the intersection. There was also no material factual dispute over the color of the traffic light. It was undisputed that Defendant saw the light as being green (Defendant's Motion for Summary Disposition, p. 4; T. 5/21/01, p. 6; Opinion and Order, pp. 3, 5). But, because the standard of review for summary disposition motions requires that the non-moving party get the benefit of all evidentiary inferences, Defendant's green light testimony gives way to Plaintiff's testimony that the light was yellow. But no testimony or evidence gives rise to a material question of fact over whether or not the light was red. And since there was no "red light" evidence, not even from Plaintiff, there was no evidence to support the Plaintiff's theory or speculation that Defendant "ran the red light."

7. One final point should be addressed and that is the suggestion in Plaintiff's Response that the issue(s) of Defendant's negligence or Plaintiff's general percentage of negligence cannot be decided in this case, as a matter of law, by summary disposition.

First of all, Plaintiff's claim in this regard is primarily based on Plaintiff's allegation that Defendant violated the statutory prohibition against running a red light and that therefore a jury had to sort out fault in this matter. However, it is clear from Plaintiff's own testimony, analyzed supra, that there is no evidence of Defendant running a red light.

Secondly, in Gamet v Jenks, 38 Mich App 719, 722-723 (1972), the Court noted the general rule that summary disposition of the issue of negligence is not favored. However, the Court then went on to affirm the trial court's grant of summary disposition to the defendant on the issue of negligence. Where the evidence is clear and there is no genuine dispute of material fact, the issue of negligence is not uniquely immune from MCR 2.116(C)(10) summary disposition. See also Richardson v Michigan Humane Society, 221 Mich App 526, 528 (1997).

WHEREFORE for all of the foregoing reasons, Defendant-Appellant Aaron Brown requests that this Honorable Court grant the relief requested in Defendant's pending Application for Leave to Appeal.

Respectfully submitted,

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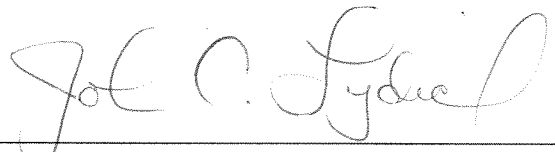

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Dated: March 10, 2003

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PROOF OF SERVICE

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

VERNITA M. RESST, being first duly sworn, deposes and says that on the 10th day of March, 2003, she served a copy of Defendant's Reply to Plaintiff's Response to Defendant's Application for Leave to Appeal and this Proof of Service on:

GERALD A. GORDINIER, ESQ.
245 Barclay Circle, Suite 200
Rochester Hills, MI 48307

by placing said documents in the United States mail, properly addressed, with full postage prepaid thereon.

VERNITA M. RESST

Subscribed and sworn to before me
this 10th day of March, 2003

JANET S. DOLIN, Notary Public
Wayne County, MI
(Acting in Oakland County, MI)
My Commission Expires: 10/4/03

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March 10, 2003

Federal Express

Clerk of the Court
Michigan Supreme Court
925 W. Ottawa
Lansing, MI 48915

Re: Perkovic v Brown
Supreme Court No. 123171
Court of Appeals No. 235699
Macomb County Circuit Court No. 00-4399 NI

Dear Sir/Madam:

Enclosed for filing in the above-referenced matter are an original and seven copies of Defendant's Reply to Plaintiff's Response to Defendant's Application for Leave to Appeal and Proof of Service.

Your attention to this matter is appreciated.

Sincerely,

John A. Lydick

JAL:vr
Enclosures

cc: Gerald A. Gordinier, Esq.
James P. O'Sullivan, Esq.
(with enclosures)

RECEIVED
MAR 11 2003
CORBIN R. DAVIS
CLERK, SUPREME COURT